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Supreme Court, U.S.
FILED

95 1349 FEB 20 1996

No. _____

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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTURO MORALES, Petitioner

v.

INDUSTRIAL COMMISSION OF ARIZONA,
HIDRO GAS, and
RELIANCE INSURANCE COMPANY, Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF ARIZONA,
DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Arizona Revised Statute [section] 1061(A) requires that an employee must file a notice of claim for compensation within one year of the date of the injury. Three exceptions excuse a late filing (justifiable reliance, insanity, and incapacity), none of which relate to an employee's failure to receive notice of his right to claim benefits. Unexcused, untimely filing bars an employee's claim.

The question presented is whether the Arizona statute's failure to provide an employee adequate notice of a right to claim compensation benefits before extinguishing such right is repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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v.

INDUSTRIAL COMMISSION OF ARIZONA,
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RELIANCE INSURANCE COMPANY, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF ARIZONA,
DIVISION ONE

Arturo Morales respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals, State of Arizona, Division One in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1-24) is unreported. The denial of Petitioner's Petition for Review to the Supreme Court, State of Arizona (App. B, 25) is unreported. The Decision Upon Hearing and

Findings and Award Denying Compensability For Lack of Jurisdiction, by the Administrative Law Judge, Industrial Commission, State of Arizona, (App. C, 26-32), is unreported. The Decision Upon Review Affirming Decision Upon Hearing and Findings and Award Denying Compensability, by the Administrative Law Judge, Industrial Commission, State of Arizona (App. D, 33-35) is unreported.

JURISDICTION

The Court of Appeals, State of Arizona, Division One, entered its Order and Memorandum Decision on May 30, 1995. The Supreme Court, State of Arizona, denied a timely petition for review on November 21, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. [section] 1257(a).

STATUTORY PROVISIONS INVOLVED

Arizona Revised Statute [section] 23-1061(A) provides in relevant part as follows:

. . .[N]o claim for compensation shall be valid or enforceable unless the claim is filed with the commission by the employee. . .in writing within one year after the injury occurred or the right thereto accrued. The time for filing a compensation claim begins to run when the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should know that he has sustained a compensable injury. Except as provided in subsection B of this section, neither the commission nor any court shall have jurisdiction to consider a claim which is not timely filed under this subsection, except if the employee or other party entitled to file the claim has delayed in doing so because of justifiable reliance on a material representation by the commission, employer or insurance carrier or if the employee or other party entitled to file the claim is insane or legally incompetent or incapacitated at the time the injury occurs or the right to compensation accrues or during the one-year period thereafter. If the insanity or legal incompetence or incapacity occurs after the one-year period has commenced, the running of the remainder of the one-year period shall be suspended during the period of insanity or legal incompetence or incapacity. If the employee or other party is insane or legally incompetent or incapacitated when the injury occurs or the right to compensation accrues, the one-year period commences to run immediately upon the termination of insanity or legal incompetence or incapacity. The

> commission upon receiving a claim shall give notice to the carrier.

Ariz. Rev. Stat. Ann. [section] 23-1061(A) (1983).

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . .

U.S. CONST., amend. XIV, [section] 1.

STATEMENT OF THE CASE

This case involves the question of whether, consistent with the Due Process Clause of the Fourteenth Amendment, Arizona can enforce a statute which bars a claimant from recovering worker's compensation benefits for failure to file a notice of claim within a statutorily prescribed period, when the statute fails to provide means to ensure the claimant has received notice of his right to

make such a claim.

I.

FACTS AND ADMINISTRATIVE PROCEEDINGS

A. Background Facts.

On July 18, 1990, Petitioner Arturo Morales, a Mexican citizen, suffered severe and extensive injuries when his truck rolled off the interstate highway near Gila Bend, Arizona. He was hospitalized in Yuma, Arizona for about seven days following the accident. After he was released from the hospital, he returned to Juarez, Mexico, where he lived. He remained immobile for approximately one year following the accident.

His employer was Respondent Hidro Gas. He was working for Hidro Gas when the accident occurred. He had driven to Arizona from Tijuana, Mexico to pick up butane gas from a supplier in Peoria, Arizona, then to return the same day to Tijuana.

Hidro Gas hired Mr. Morales in 1983 to work as a truck driver. After obtaining a Texas driver's license at his employer's direction, for several years he daily drove from Juarez, Mexico to Midland Texas, to pick up gas from a supplier and return to Juarez. Hidro Gas assigned him the daily route from Tijuana to Peoria Arizona in November 1989, which he traveled until the accident.

B. Administrative Proceeding Below.

Hidro Gas did not report the injury to the Arizona Industrial Commission or provide Mr. Morales information about its workers' compensation, although required by statute to do so for an employee's known work-related injury. See Ariz. Rev. Stat. [section 23-908(A), (F)-(G) (1983).

Morales first contacted a lawyer in Juarez for help, and was referred to an attorney in El Paso, Texas. He first filed a

Texas civil suit against Hidro Gas. Morales filed a claim for compensation benefits in Texas in November 1991. On May 5, 1992, Respondent Reliance Insurance Company, Hidro's insurance carrier, controverted the Texas workers' compensation claim, asserting the Morales did not have a Texas claim because he resided in Mexico, was recruited and hired there, and was injured in Arizona. On May 26, 1992, the Texas Workers' Compensation Commission denied the claim.

On November 23, 1992, Morales filed a Worker's Report of Injury for the July 1990 injury with the Arizona Industrial Commission. On April 5, 1993, Reliance denied the claim. Morales thereafter timely requested a hearing. On August 12, 1993, Reliance raised the affirmative defense of an untimely claim.

After the hearing the Administrative Law Judge dismissed Morales's claim, pursuant to

Ariz. Rev. Stat. [section] 23-1061(A), because Morales's claim was filed more than a year after the injury and was otherwise unexcused. Appeals followed.

C. Texas Proceeding.

The Petitioner's Texas claims are not germane to this appeal but a brief summation may be helpful to the Court's understanding of the case. Petitioner appealed the May 26, 1992 denial of his Texas compensation claim, and timely filed suit in a Texas court for de novo review. The Texas trial court granted summary judgment in favor of the carrier (named Planet Insurance Company) on October 26, 1993. On April 6, 1995, the court of appeals reversed and remanded the case, on the grounds that there existed a fact issue as to whether Morales was "hired" in Texas and therefore a "Texas employee" entitled to benefits under the act. The matter is

presently pending.

Petitioner has received no compensation benefits from either Texas or Arizona. He is precluded by both acts from double recovery.

II.

ESTABLISHING THIS COURT'S JURISDICTION OF THE QUESTION PRESENTED BY THIS PETITION

The court of appeals declined to rule on whether the Arizona statute was consistent with the Due Process Clause of the Fourteenth Amendment, on the grounds that the Petitioner failed to comply with the state procedural requirement of first raising the issue during the administrative proceeding. See App. A, pp. 16-19). Accordingly, an important issue raised by this petition is whether the Court has authority to review the Arizona decision. For the reasons stated below, it does.

A. How the Fourteenth Amendment Claim was Presented.

1. To the Administrative Law Judge.

In his Request for Review, the Petitioner specifically drew into question the "full faith and credit clause of the United States Constitution" but did not specify the "Due Process Clause" or the Fourteenth Amendment. The relevant portions are as follows:

> The Applicant alleges that the whole purpose of a statute of limitations is for the purpose of providing notification to the Defendants of an Applicant's contention of an injury.
>
> In the instant case, the Defendants were aware of the Applicant's injuries, and were aware of all of the facts of the accident. It appears that the Administrative Law Judge has made a finding that the Applicant, a citizen of Mexico, must be deprived of his legitimate workers' compensation benefits, because he made a wrong choice of forum.
>
> The statute of limitation and one year statute should have been tolled during the period of time that the Texas workers' compensation claim was being pursued.

> The Applicant maintains that the Administrative Law Judge did not apply the full faith and credit clause of the United States Constitution and give meaning to the Texas statute which compels the tolling of any statute of limitation during the period of time that a claim is being litigated in the wrong jurisdiction. (See attached copy of 16.064 of the Texas civil practice and remedies code).
>
> The Applicant alleges that the Doctrine of Estoppel and the Doctrine of Equity demands that the Defendants not be permitted to raise the "statute of limitations", since the Defendants themselves were fully aware of the facts of the claim, were fully aware that a claim for workers' compensation had been filed in Texas, and were not prejudiced whatsoever by the "late" filing of this claim in the State of Arizona.

See App. E, pp. 37-39.

2. To the Arizona Court of Appeals.

In its Opening Brief to the court of appeals, the Petitioner in its Issues Presented drew into question whether the Arizona's Worker's Compensation Act violated the "Due Process Clause of the United States

Constitution," and in his argument specifically referred to A.R.S. 23-1061(A). The relevant portions are as follows:

ARGUMENT VII

WHETHER SELECTIVE ENFORCEMENT OF THE ARIZONA WORKER'S COMPENSATION ACT VIOLATES ARTICLE XVIII, SECTION 8 OF THE ARIZONA CONSTITUTION, AND THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION

In Allen v. Industrial Comm'n of Arizona, 152 Ariz. 405, 733 P.2d 290 (Ariz. 1987), the Arizona Supreme Court upheld A.R.S. [section] 23-1061(A) as a constitutionally permissible reasonable regulation of Arizona's constitutionally mandated requirement to provide a "just and humane" method of providing compensation benefits to injured employees. Allen, 733 P.2d at 297. However, in reaching this conclusion, the Arizona Supreme Court emphasized that the statute "provides the claimant with a reasonable opportunity to file a claim." Id.

An employer's failure to report the injury, as required by the Act, constitutes grounds for tolling the one-year period, or postponing the period in which the claim has "accrued" for purposes of

> determining when the time period for filing the claim begins. Alternatively, if the employer's violation of its duty to report the injury does not have such effect, then A.R.S. [section] 23-1061(A), standing alone, no longer provides the claimant with such reasonable opportunity.
>
> There exists no reasonable means from which Mr. Morales could have reasonably ascertained his right to benefits under Arizona law when, as in this case, his employer's violations of the same Act resulted in his failure to receive notice of any kind from any entity of such right.
>
> . . .
>
> In addition, enforcing a one year limit on an employee's time in which to file a claim without imposing a similar penalty on an employer who violates the Act by failing to report the injury deprives the employee of "an opportunity . . . granted at a meaningful time and in a meaningful manner" for "[a] hearing appropriate to the nature of the case", and is accordingly violative of the due process clause of the United States Constitution. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), Armstrong v. Manzo, 380 U.S. 549, 552 (1965).

See App. F, pp. 51-54.

3. How the Claim was Presented to the Arizona Supreme Court.

In his petition for review to the Supreme Court of Arizona, the Petitioner in his Issues Presented for Review and Questions Presented drew into question whether notice requirements "violate the Arizona and United States Constitutions", and in his argument again specifically referenced the "due process clause of the United States Constitution." The Petitioner also raised the decision of the court of appeals to decline to rule as to whether the state statute violated the Due Process Clause. The relevant portions are as follows:

> **B. ISSUES PRESENTED FOR REVIEW**
>
> . . . .
>
> (2) Does the Arizona Worker's Compensation Act's failure to provide sanction for an employer's notice violations in a manner similar to sanctions for employee notice requirements violate the Arizona and United States Constitutions?

(3) Should the Court of Appeals have ruled on other issues raised by the Petitioner on appeal?

. . . .

C. REASONS WHY THIS PETITION SHOULD BE GRANTED

. . . .

4. The Supreme Court's Ruling as to the Constitutionality of A.R.S. [section] 23-1061(A) Should be Modified.

. . . .

(b) Constitutionality of the Arizona Worker's Compensation Act.

In Allen v. Industrial Comm'n of Arizona, 152 Ariz. 405, 733 P.2d 290 (Ariz. 1987), the Arizona Supreme Court upheld A.R.S. [section] 23-1061(A) as a constitutionally permissible reasonable regulation of Arizona's constitutionally mandated requirement to provide a "just and humane" method of providing compensation benefits to injured employees. Allen, 733 P.2d at 297. However, in reaching this conclusion, the Arizona Supreme Court emphasized that the statute "provides the claimant with a reasonable opportunity to file a claim." Id.

However, a statute may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right even though its general validity is beyond question. Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Thus, even if [section] 23-1061(A) is considered a reasonable regulation in general application, as applied to Mr. Morales, the one year limitations period, without a tolling provision while the same is pending in a foreign jurisdiction, operates to deprive him of his due process right to a hearing and must therefore be held invalid.

. . . .

In addition, enforcing a one year limit on an employee's time in which to file a claim without imposing a similar penalty on an employer who violates the Act by failing to report the injury deprives the employee of "an opportunity . . . granted at a meaningful time and in a meaningful manner" for [a] hearing appropriate to the nature of the case", and is accordingly violative of the due process clause of the United States Constitution. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), Armstrong v. Manzo, 380 U.S. 549, 552 (1965).

D.PRESERVATION OF ISSUES FOR APPEAL.

The Court of Appeals declined to

rule on the following issues presented by the Petitioner:

. . .

5. Whether selective enforcement of the Arizona Worker's Compensation Act violates Article XVIII, Section 8 of the Arizona Constitution, and the due process clause of the United States Constitution.

The Court of Appeals ruled that the Ruth exception was inapplicable with respect to these issues. [Decision, at pp. 8-9.] However, the Ruth exception at a minimum applies to the Petitioner's constitutional claims. See also, Barrio v. San Manuel Division Hospital, 692 P.2d 280 (Ariz. 1984).

Moreover, the exception is particularly applicable "if the issues do not turn on disputed evidence and do not require the court to determine additional facts." Rubens v. Costello, 251 P.2d 306 (Ariz. 1952); and Resolution Trust Corp. v. Foust, 869 P.2d 183 (Ariz. App. Div. 1993).

This is precisely the case presented by this Appeal. The Respondent employer does not contest its failure to comply with the employer notice provisions of the Act. All of the issues presented by the Petitioner turn on the legal significance of the employer's failure to comply with its notice

> requirements. For this reason, and because of the general interest of the State of Arizona in determining the rights of all workers affected by the court's interpretation of the Arizona Workers' Compensation Statute, the Petitioner's issues presented by this appeal should be reviewed and ruled upon.

See App. F, pp. 60-61; 65-71.

B. Why the Court has Jurisdiction over the Question Presented in this Petition.

This Court has jurisdiction to decide whether a federal question has properly been presented for review. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928); Hathorn v. Lovorn, 457 U.S. 255 (1982). Notwithstanding the decision of the court of appeals to decline to rule on the Petitioner's Fourteenth Amendment claim, this Court nevertheless has authority to review the Arizona state court decision for the following reasons:

1) the state procedural rule upon which the court of appeals relied has been

inconsistently applied in the past, particularly with respect to constitutional claims; and

2) the state procedural rule upon which the court of appeals relied, which required Petitioner to first present his Fourteenth Amendment claim to the Administrative Law Judge, serves no legitimate purpose because the ALJ lacked the power to rule on the constitutionality of an Arizona statute.

1. Inconsistent application.

The court of appeals declined to rule on Petitioner's Fourteenth Amendment claim on the grounds that he failed to present such the issue to the ALJ for review. See App. A, pp. 16-18; Stephens v. Industrial Comm'n, 114 Ariz. 92, 95, 559 P.2d 212, 215 (App. 1977).

However, Arizona law provides an exception to this requirement if the question raised on appeal "is one of 'a general public

nature, affecting the interests of the state at large." Ruth v. Industrial Comm'n, 490 P.2d 828, 830 (Ariz. 1971) (quoting South Tucson v. Board of Supervisors of Pima County, 84 P.2d 581, 584 (Ariz. 1938).

In Ruth, the petitioner raised a state constitutional question for the first time in a motion for rehearing to the Court of Appeals. Ruth, supra, 490 P.2d at 830, n. 3. Similarly, in Barrio v. San Manuel Division Hospital for Magma Copper Co., 692 P.2d 280 (Ariz. 1984), the petitioner raised a federal constitutional question for the first time in a motion for rehearing to the Court of Appeals. Barrio, supra, 692 P.2d at 283. In both instances the Arizona Supreme Court addressed the constitutional claims.

The court of appeals declined to follow Ruth. It cited no authority but stated that the Petitioner's Due Process claim was not of

general statewide significance because "[t]he current case will affect few claimants other than Morales" and "[e]xpanding Ruth to every issue of interpretation would create an exception that swallows the rule requiring a party to exhaust remedies before raising an issue on appeal." App. A, p. 19.

This reasoning was faulty. Petitioner's Due Process claims will affect other claimants. However, unlike the plaintiffs in Ruth, claimants similarly situated to Petitioner have no opportunity to present such a claim collectively, because no one can identify or predict those employees who will suffer an work-related injury and not be told of the availability of worker's compensation or otherwise be aware of benefits. See e.g., Thompson v. Industrial Comm'n of Arizona, 772 P.2d 1116, 1118 (Ariz. 1989) (claimant failed to report accident (heart attack) "forthwith"

to employer as required by worker's compensation law because "he did not know he was entitled to worker's compensation").

Moreover, other Arizona courts have ruled that a plaintiff may make a constitutional claim without exhausting administrative remedies on the grounds that such a claim is "jurisdictional". See, e.g., Rouse v. Scottsdale Unified School Dist. No. 48, 752 P.2d 22, 24 (Ariz. Ct. App. 1987).

The decision of the court of appeals to decline to hear Petitioner's Due Process claim and the Arizona Supreme Court's decision to deny Petitioner's petition for review was inconsistent with past rulings and therefore does not provide an adequate and independent state ground in this case. Johnson v. Mississippi, 486 U.S. 578, 587 (1988); Hathorn, supra, 457 U.S. at 263.

2. The procedural rule serves no legitimate purpose.

The Industrial Commission derives its power from statutory enactment, and has no power beyond that which has been granted by statute. Pressley v. Industrial Comm'n, 236 P.2d 1011, 1017 (Ariz. 1951). An administrative agency must function only within the parameters of its statutory grant. Kennecott Copper Corp. v. Industrial Comm'n, 564 P.2d 407 (Ariz. 1977); Gila Valley Block Co., Inc. v. Industrial Comm'n, 585 P.2d 573 (1978).

It is highly questionable whether a legislature could theoretically grant to an administrative agency the power to rule on state constitutional issues without violating federal constitutional separation of powers principles. Here, it is enough to note that the Arizona legislature has not granted such power. Moreover, Arizona courts have held

that the doctrine of exhaustion of administrative remedies should apply only when a claim is cognizable by the administrative agency, and should not be summarily applied where jurisdiction of the agency is contested or the agency's expertise is unnecessary. Campbell v. Chatwin, 428 P.2d 108 (1967); see also Rouse, supra, 752 P.2d at 24. For this reason, requiring Petitioner to raise a federal constitutional claim in a state administrative proceeding before an ALJ who incapable of ruling on the claim serves no legitimate state purpose. For this reason also, the procedural bar the court of appeals relied upon does not constitute an adequate and independent state ground. Michigan v. Tyler, 436 U.S. 499, 511, n.7. (1978).

For these reasons, the Court has jurisdiction over the question presented by the Petitioner.

REASONS FOR GRANTING THE PETITION

I.

THE ARIZONA STATUTE IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT FAILS TO PROVIDE FOR ADEQUATE AND EFFECTIVE NOTICE TO CLAIMANTS OF THEIR RIGHT TO OBTAIN COMPENSATION BENEFITS

In Matthews v. Eldridge, 424 U.S. 319 (1976), the Court explained the method for determining what process is due before a person can be deprived of a protected interest. The Court instructed that three factors must be weighed:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 335. The Matthews v. Eldridge factors have become the standard for determining

whether certain challenged administrative procedures comply with the requirements of due process.

The Arizona Workmen's Compensation Act established a comprehensive system for adjudicating all controversies arising out of an injured workman's claim. See generally Allen v. Industrial Comm'n of Arizona, 733 P.2d 290, 292-95 (Ariz. 1987) (discussing history of the act); Sandoval v. Salt River Project, 517 P.2d 706, 711 (Ariz. Ct. App. 1977). Under the Act, employers complying with the statutory mandate to secure worker's compensation insurance "shall not be liable for damages at common law or by statute . . .for injury or death of an employees wherever occurring." Ariz. Rev. Stat. [section] 23-906(A) (1983). There can be little doubt that the loss of an claimant's compensation benefits constitutes a deprivation for

Fourteenth Amendment purposes, since the act also extinguishes an employee's common law cause of action as well as provide for the administration of compensation benefits. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (intangible property right); Goldberg v. Kelly, 397 U.S. 254 (1969); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981).

In 1980, the Arizona legislature amended A.R.S. [section] 23-1061 by abolishing any equitable "good cause" exceptions to the statutory requirement that injured employees file a compensation claim within one year "after the injury occurred or the right thereto accrued." Failure to file within the prescribed period was excusable only under the enumerated sections of the act. Ariz. Rev. Stat. [section] 23-1061(A) (1983). The Arizona Supreme Court ruled the amendments as

constitutional. Allen v. Industrial Comm'n of Arizona, 733 P.2d 290 (Ariz. 1987).

In a companion case to Allen, the Arizona Supreme Court also reiterated that "the time for filing a workers' compensation claim begins to run when the claimant knew or in the exercise of reasonable diligence should have known of the compensable nature of the injury. Pacific Fruit Express v. Industrial Comm'n of Arizona, 735 P.2d 820, 823 (Ariz. 1987) (emphasis added).

It is this interpretation of the statute that collides with the Fourteenth Amendment: the statute provides that an injured employee's time for filing a claim begins when he knew or should have known of the injury, but fails to account for when the injured employee receives notice of his right to obtain compensation benefits.

In Tulsa Professional Collection Services

v. Pope, 485 U.S. 478, 483 (1988), the Court reiterated the rule set forth in Mullane: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . ." Tulsa, supra, 45 U.S. at 484, citing Mulllane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Arizona law requires that an employer "inform his insurance carrier and the commission" within 10 days "after receiving notice of an accident." Ariz. Rev. Stat. [section] 23-908(F)-(H) (1983). When the employer complies with this provision, the employee receives actual notice of a right to benefits because the carrier must then either deny the claim within 21 days or make the employee's first installment of an employee's

compensation. See Ariz. Rev. Stat. [section] 23-601(M); 23-1062(B) (1983). Moreover, the Act provides that the Commission "shall send a claim form to the employee" after receiving notification of the injury. See Ariz. Rev. Stat. [section] 23-1061(C) (1983).

However, when the employer fails to file a claim in violation of the statute, no other means exist to ensure that an injured employee has notice of a right to obtain compensation benefits.

In Tulsa, the Court ruled the Fourteenth Amendment required actual notice be provided to known or reasonably ascertainable creditors in the state administration of a "nonclaim" provision of the Oklahoma Probate Code. Tulsa, supra, 485 U.S. 490-91. In the state action presented by this case, it is far easier to identify "known or reasonably ascertainable" claimants because they are by

definition employees whose employers are subscribers to the state compensation insurance plan.

The difficulty lies in identifying employees who have or will suffer work-related injuries. However, rather than construct a statutory scheme of providing notice in a manner "reasonably calculated to apprise interested parties" -- employees -- of their potential or actual right to compensation benefits, the Arizona statutory scheme provides for no such notice at all before a claimant may be barred from seeking compensation benefits. Instead the employee who has "untimely" filed a claim for benefits, is left to fit into one of the enumerated exceptions to "excuse" an untimely filed claim.

This scheme does not meet the fundamental fairness litmus test of the Fourteenth

Amendment. It is worse than Tulsa, and Logan, and Mullane, because the scheme presented here provides for notice at all of a claimant's right to obtain compensation benefits. It assumes that employees know they have such rights, or that employers will recognize all injuries as work-related and timely provide notice to its carrier and to the Industrial Commission.

The Fourteenth Amendment requires more than this. At a minimum, an employer's failure to comply with its statutory requirement to file with Industrial Commission should toll the period in which an injured employee is required to file a notice of claim.

II.

THE QUESTION PRESENTED IS IMPORTANT

Every state has a worker's compensation scheme with notice provisions similar to that of Arizona's. That most employees have actual knowledge of their right to obtain compensation benefits for work-related injuries -- either because they are familiar with the compensatory system or because their employer properly reports an employee injury to its carrier and to the administrative authority -- does not diminish the importance of a state's need to establish a reasonable means to ensure all employees who have work-related injuries receive notice of a right to claim compensation benefits.

The nature of the deprivation involved is particularly acute. As this case aptly illustrates, an employee's claim for compensation benefits, when combined with the

extinguishment of any common law claims against an employer -- often encompasses all other fundamental rights protected by the Constitution.

The inability to recognize similarly situated claimants such as the Petitioner is particularly acute, since an employee not aware or apprised of his right to claim benefits will not likely file a claim within the prescribed period, or at all.

The question presented by this Petition is important The Court should grant the Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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